IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.08.2007

CORAM

THE HONOURABLE MR. JUSTICE F.M.IBRAHIM KALIFULLA
and
THE HONOURABLE MR. JUSTICE S.TAMILVANAN

Writ Petition No.22207 of 2002

K.Ganesan .. Petitioner

Versus

1.The Registrar
Central Administrative Tribunal
Madras Bench
Chennai.

2.Union of India
Ministry of Personnel, Public Grievances
and Pensions, Department of Pension &
Pensioner Welfare, represented by
Secretary, New Delhi 110 001.

3.The Controller General of Accounts
Ministry of Finance, Department of Expenditure
7th Floor, Lok Nayak Bhavan
Khan Market, New Delhi 110 003. .. Respondents

Writ petition filed under Article 226 of Constitution of India praying for issue of a Writ of Certiorarified mandamus, to call for the records relating to the order of the first respondent in O.A.No.471 of 2001 dated 28.12.2001 and quash the same and consequently hold that the alternative (b) in the OM dated 31.01.1986 and Rule 37A(i)(b) of the Central Civil Services (Pension) Rules, 1972 as they stood at that time were illegal, were violative of Article 14 and 16 of the Constitution and violated Sections 10 and 12 of the Pensions Act, 1871 and further direct the second and third respondents to pay pension with interest thereon to the petitioner against the 2/3rd pension commuted from the date of commutation after adjusting the amount already paid with interest thereon.

For Petitioner : Mr. Balan Haridas
For Respondents : Mr. S.Udayakumar
SCGSC

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ORDER

(Order of the Court was delivered
by F.M.IBRAHIM KALIFULLA,J.)

The petitioner is aggrieved against the order of the Central Administrative Tribunal dated 28.12.2001 passed in O.A.No.471 of 2001. The petitioner was originally employed as Deputy Controller General of Accounts in the third respondent organisation. He opted to join a public sector undertaking, viz., the Bharat Heavy Electricals Limited based on the Government of India O.M.No.28016/5/85-Estt.(c) dated 31.01.1986. Accordingly, he submitted his resignation on 12.05.1986 to the third respondent and sought for its acceptance with effect from 28.05.1986. He also submitted his option on 12.05.1986 for receipt of pensionary benefits as per paragraph-4(i)(b) of the Provisions contained in O.M.No.28016/5/85-Estt.(c) dated 31.01.1986, which provided for a particular manner of commutation of pension and of 1/3rd and 2/3rd apart from pro-rata gratuity as prescribed under Rule 37-A of the CCS Pension Rules. The resignation of the petitioner was accepted and he was relieved from the Government of India Service with effect from 26.05.1986 afternoon. He joined the services of BHEL on 03.06.1986. By virtue of the option for receipt pensionary benefits exercised by the petitioner, the entire pension of the petitioner was commuted and the same was paid to him in July, 1986.

2. Be that as it may, in the Judgment of the Honourable Supreme Court in "Common cause" case reported in (AIR 1987 SC 210), wherein the Honourable Supreme Court held that on the expiry of fifteen years from the date of commutation, the entire pension would get revived in respect of the Government servants who have commuted their pension partially. The said judgment was to take effect from 01.04.1985. To give effect to the Judgment, the third respondent is stated to have issued O.M.No.34/2/86-P & PW dated 05.03.1987 stating that the Central Government employees who got themselves absorbed in the public sector undertakings and who had received or opted to receive a lump sum amount in lieu of pension were not entitled to the benefit granted by the Honourable Supreme Court in the decision reported in 1997(1) SCC 142. An association called welfare association of absorbed Central Government Employees in Public Sector undertakings approached the Honourable Supreme Court for the extension of the benefits granted in the "Common Cause" case to the absorbed employees also which was rejected by the Honourable Supreme Court. However, the said association approached the Honourable Supreme Court again and in the decision reported in 1996(2)SCC-187, the Honourable Supreme Court once again considered the validity of O.M dated 05.03.1997. While doing so, the Honourable Supreme Court took note of Rule 37 and 37-A of the CCS Pension Rules, 1972, and ultimately held that in so far as the 1/3rd commuted pension was concerned, even the absorbed employees were entitled for the benefits granted in the "Common Cause" Judgment and accordingly granted the same. In the ultimate conclusion, the Honourable Supreme Court held as under:

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"For the foregoing reasons, we hold that the petitioners are entitled to the benefits as given by this Court in "Common Cause" case so far as it related to restoration of one-third of the commuted pension. Consequently, the impugned paragraphs-4 of Office Memorandum dated 05.03.1987 is quashed. The writ petitions are accordingly allowed to the extent indicated above. No costs."

3. While granting the said relief, the Honourable Supreme Court also referred decision reported in Welfare Association of Absorbed Central Government Employees in Public Enterprises vs. Union of India reported in (1991(2) SCC 265), distinguished the same by stating that Rule 37-A was not brought to the notice of the Court. That apart, in a subsequent decision in Welfare Association of A.C.G.E in P.E v. Arvind Verma reported in (AIR 1998 SC 2862), by way of clarification the Honourable Supreme Court stated as under in paragraph-6.

"After hearing counsel on both sides, we make it clear that the respondents are liable to restore not only the pension as ordered by this Court in the said judgment, but also all the attendant benefits as given to the Central Government pensioners. We hold that there was some genuine doubt on the part of the respondents in construing and giving effect to the judgment of this Court and, therefore, there is no contempt. We now direct the respondents to comply with the judgment of this Court as explained hereinbefore within three months from this date."

4. Subsequently, in the decision reported in AIR 2000 SC 3387 (P.V.Sundara Rajan v. Union of India), the question arose as to whether the absorbees who had commuted 100% pension were also entitled for the relief granted in the common cause case. While dealing with the said claim, the Honourable Supreme Court has held as under in paragraph-13.

"13. The partly claimed by Lt.Col.Malhotra and other absorbees who had commuted 100% pension, in our view, is entirely misplaced. The contention that what is commuted or given up is an amount and not the right to receive pension or right to receive post-commutation revision and attendant benefits' including dearness relief on the gross entitled pension on the dates they were granted to other Government pensioners, is only illusory. The decision in the case of State of T.N. v. V.S.Balakrishnan, 1994 Suppl.(3)SCC 204: (1994 AIR SCW 3277) on which reliance was placed by Mr.Gopal Subramanium, Senior Advocate has no applicability to the point in issue. Those who commuted 100% pension continue to remain non-pensioners till their pension is restored. In Welfare Association Case (1998 AIR SCW 1700: AIR 1998 SC 2862) (Supra), persons who commuted the full ension and who will not be given any monthly

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pension by deeming monthly pension to have been reduced to nil has been treated as a separate category. Those who commute 100% pension are not entitled to the benefit of dearness relief on full pension or other benefits as claimed herein. We also do not find any discrimination in so far as this class is concerned."

5. It is in the above stated background, the petitioner made a representation to the third respondent on 25.05.1997 contending that by virtue of Section 12 of the Pension Act 1871, the surrendering of his own right for drawing 2/3rd of his pension by opting under paragraph-4(ii)(b) of O.M dated 31.01.1986, read along with Rule 37-A of the CCS Pension Rules, was prohibited and therefore he was entitled for the restoration of his 2/3rd pension also after the period of commutation. The said claim of the petitioner was rejected by the third respondent in its communication dated 28.08.1998. Challenging the same, the petitioner preferred the present O.A.No.471 of 2001 before the Tribunal wherein the petitioner sought for a declaration that Rule 37-A (b) of the CCS Pension Rule, 1972 read with Clause(b) in O.M dated 31.01.1986 was illegal and in violation of Section 12 of the Pension Act to call for the records of the second respondent dated 28.09.1998 rejecting the petitioner's claim and issue directions to the respondents 2 and 3 to pay pension to the petitioner on the 2/3rd commuted pension from the date of commutation after adjusting the amount already paid with interest.

6. The claim was resisted by the contesting respondent herein contending that the decisions of the Honourable Supreme court are not applicable to the petitioner and that based on the said decision, there was no scope for the petitioner to challenge the validity of Rule 37-A of the CCS pension Rule and claim for restoration of the 2/3rd pension.

7. The tribunal by taking note of the option exercised by the petitioner as provided under paragraph-4(ii)(b) of Official Memorandum dated 31.01.1986, surrendering his right to claim 2/3rd pension once and for all held that none of the decisions of the Honourable Supreme Court referred to above enure to the benefit of the petitioner. The tribunal also held that the challenge made to the validity of Rule 37-A by the petitioner was not maintainable and dismissed the O.A.

8. Assailing the order of the tribunal, Mr.Balan Haridass, the learned counsel appearing for the petitioner after referring to the above decisions of the Honourable Supreme Court, contended that in all the above referred to decisions what was primarily dealt with was only the entitlement of absorbed employees to the benefit which was granted in the "common cause" case on par with the Central Government Servants and that in none of the decisions, the validity of Rule 37-A read along with paragraph-4(ii)(b) of O.M., dated 31.01.1986 vis-a-vis Section 12 of the Pensions Act, 1971, was never canvassed and therefore the conclusion of the tribunal in the order impugned in the writ petition is liable to the interfered with. According to the learned counsel, when under Section 12 of the Pensions Act, there is a prohibition imposed on the pensioner

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himself to trade off his right of pension, the surrendering of such a right in so far as it related to 2/3rd pension while exercising the option at the time of absorption in a public sector undertaking was not valid and that the very provisions providing for surrendering of such a right under Rule 37-A as well as the provisions contained in the Official Memorandum dated 31.01.1986 are consequently declared to be invalid.

9. As against the above submissions, Mr.S.Udayakumar, learned Senior Central Government Standing Counsel, would contend that when under Section 10 of the Pensions Act provision has been made for commutation of part or whole of the pension on such terms deem fit, the provision made under Rule 37-A providing for the commutation of the entire pension on certain terms including a provision of surrendering of the right to claim 2/3rd pension cannot be held to be in violation of the Pensions Act. According to the learned Senior Central Government Standing Counsel, in any event, the petitioner having accepted the commutation of the 2/3rd pension by subjecting himself to Rule 37-A and having availed the commutation of such pension, cannot be permitted to reopen the same after 11 long years as that would unsettle settled things. The learned Senior Central Government Standing Counsel also pointed out that Rule-37-A (b) providing for surrendering of 2/3rd pension itself came to be ultimately withdrawn on 31.03.1995 and therefore the validity of the said Rule need not be gone into in this writ petition.

10. After hearing the learned counsel for the petitioner and the Senior Central Government Standing Counsel, and after perusing the impugned order of the tribunal as well as the various decisions placed before us, at the outset we wish to point out that by virtue of the decisions of the Honourable Supreme Court reported in 1996 (2) SCC 187, (Welfare Association of Absorbed Central Government Employees in Public Enterprises v. Union of India), what ever rights which were available to a Government servant of the Central Government was granted in the common cause case was mutatis mutandis made available to even the absorbees. In fact by virtue of the said decision, it is no longer open to the contesting respondents to contend that after the absorption in the public sector undertakings, the applicability of either the Pensions Act or CCS rule would cease to apply.

11. The Honourable Supreme Court has asserted in unequivocal terms the rights of the absorbees for pension along with other attendant benefits under the provisions of the Pensions Act read along with CCS Pension Rules for the period of service rendered by the absorbees in the Central Government. In the light of the said settled legal position, in so far as the right of the absorbees to base their claim by relying upon the provisions of the Pensions Act and the CCS Pension Rules framed thereunder can no longer be questioned. As far as the present contention raised by the petitioner, based upon Section 12 of the Pensions Act is concerned, in none of the above referred to decisions of the Honourable Supreme Court, the said question was focused in the manner in which it is now raised before us. Though in the decision reported in

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1996(2) SCC-187(Welfare Association of Absorbed Central Government Employees in Public Enterprises v. Union of India), the issue was raised by making a reference to O.M., dated 31.01.1986 as well as Rule 37-A of the CCS Pension Rules, the question was confined to the limited extent as to whether the right of the absorbees to claim the benefits as granted in the common cause case was available to them in so far as it related to 1/3rd commuted pension pursuant to their obsorption in the public sector undertakings for the period of service rendered in the Central Government Organisation. The Honourable Supreme Court has countenanced such a right and held that such benefit which was made available in the common cause case to the Central Government Employees was equally available to the absorbees in respect of 1/3rd commuted pension. Though we made our anxious consideration to the decisions reported in 1991(2)SCC 265 (Welfare Assn. Of Absorbed Central Government Employees v. Union of India, 1996(2) SCC-187 (Welfare Association of Absorbed Central Government Employees in Public Enterprises v. Union of India), AIR 1998 SC 2862 (Welfare Assocn. Of A.C.G.E., in P.E v. Arvind Verma), and AIR 2000 SC 3387 (P.V.Sundara Rajan v. Union of India), in none of the decisions, the question as to the prohibition imposed under Section 12 of the Pensions Act to surrender ones own right of a pensioner was never considered. In paragraph-13 of the decision of the Honourable Supreme Court reported in AIR 2000 SC 3387, the Honourable Supreme Court while holding that the absorbees who had commuted 100% pension, continue to remain non-pensioners made clear, such position would be prevalent only till their pension is restored. Therefore, when in the case on hand, when the petitioner who also sought for 100% commutation of pension at the time of his absorption in BHEL in the year 1986, in the light of the decision of the Honourable Supreme Court reported in 1996(2) SCC-187 (Welfare Association of Absorbed Central Government Employees in Public Enterprises v. Union of India), he was fully entitled for the benefits granted to the Government Servants in the common cause case in so far as it related to 1/3rd pension commuted by him. By virtue of such a declaration of law made by the Honourable Supreme Court which made it clear that the petitioner was nevertheless a pensioner, it will have to be held that as a pensioner, he would be entitled for the protection under Section 12 of the Pensions Act 1871 in so far as it related to surrendering of his rights as provided under Rule 37-A of the CCS Pension Rules. In other words, we hold that having regard to the above statement of law as enunciated by the Honourable Supreme Court in the decision reported in 1996(2) SCC-187(Welfare Association of Absorbed Central Government Employees in Public Enterprises v. Union of India), the petitioner would be governed by the provisions of Pensions Act 1871 and consequently the case of the petitioner will have to be examined in the light of the provisions contained therein. When once we reach the above said conclusion, thereafter the question is whether the commutation of whole of the pension by the petitioner in so far as it related to 1/3rd and 2/3rd of it based paragraph-4(ii)(a)(b) of O.M., dated 31.01.1986 read along with Rule 37-A can be held to have disabled the petitioner from seeking for restoration of such pension as has now been claimed in the O.A.

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12. Section 12 of the Pensions Act, 1871, reads as under:

> "12- Assignments etc., in anticipation of pension to be void.
>
> All assignments, agreements, sales and securities of very kind made by the person entitled to any pension, pay or allowance mentioned in section 11 in respect of any money not payable at or before the making thereof on account of such pension, pay or allowance or for giving or assigning any future interest therein are null and void."

13. Under Section 10 as stated by us earlier, while commutation of pension for the whole or any part of it can be opted by a pensioner based on such terms fixed under the Rules, it will have to be stated that such enabling provision providing for commutation for either part or whole of the pension can only for commutation purposes and that under the guise of commutation, it will not be open for the Government to once and for all wipe of the very right to restoration of such pension after the expiry of the period of commutation. In fact, Rule 37-A clause (b) though uses the expression the commutation of balance amount of pension namely the 2/3rd of pension, the stipulations contained therein providing for such commutation of 2/3rd pension would be subject to surrendering of the right of Government servant, for drawing the 2/3rd pension would run counter to the very concept of commutation which will not be in consonance with Section 10 providing for commutation of pension alone and not the right to claim pension after the period of commutation.

14. That apart, even if the petitioner was obliged to surrender such a right for the drawal of 2/3rd of his pension by agreeing for the terms contained in Rule 37-A of Pension Rules in as much as such a wholesale surrender of the right to pension as contained in the said Rule conflicts Section 12 of the Pensions Act, it will have to be held that the Rules providing for such surrendering of right in opposition to Section 12 of the Act cannot be permitted to operate. When under Section 12 of the Act, there is a prohibition imposed on the pensioner himself to barter away his right under very many circumstances except as provided under Section 12-A of the Pensions Act, we are convinced that surrendering of the right for drawal of 2/3rd of Pension after its commutation as provided under Rule 37-A (b) is repugnant to Section 12 and is straight away hit by the prohibition imposed under Section 12. Consequently any action based on Rule 37-A(b) is wholly illegal and therefore the surrendering of rights of the petitioner for drawing 2/3rd of his pension at the time of its commutation to that extent can not operate against his interest. We therefore declare that such surrendering rights by the petitioner at the time of his absorption in the year 1986 while commuting 2/3rd of his pension, was invalid and consequently the petitioner was lawfully entitled for the restoration of his pension after the expiry of the period of commutation of 2/3rd pension.

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15. Having regard to our above conclusion, we set aside the order of the third respondent dated 28.09.1998 and direct the second and third respondents to restore the pension payable to the petitioner after the expiry of period of commutation of 2/3rd pension and pay all the arrears payable to him and continue to pay the same for the future period. While directing the respondents 2 and 3 to restore the petitioners 2/3rd pension after the expiry of its commutation period, we however refrain ourselves from directing payment of interest on the arrears, inasmuch as, the petitioner came forward with this claim for the first time in the year 1987, that is nearly after 11 years after his retirement. We therefore do not find any justification for granting interest while restoring the petitioner's 2/3rd pension after commutation. The writ petition stands allowed. The impugned order is set aside with the direction for restoration of 2/3rd pension along with direction for payment of arrears as stated above. The second and third respondents are hereby directed to comply with our directions within eight weeks from the date of receipt of a copy of this order. There is no order as to costs.

ksr

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.The Registrar
Central Administrative Tribunal
Madras Bench
Chennai.

2. The Secretary,
Union of India, Ministry of Personnel,
Public Grievances and Pensions,
Department of Pension & Pensioner Welfare,
New Delhi 110 001.

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3.The Controller General of Accounts
Ministry of Finance, Department of Expenditure
7th Floor, Lok Nayak Bhavan
Khan Market, New Delhi 110 003.

+ one cc to Mr. Balan Haridas, Advocate sr no 48346

RSM(CO)
NM(22.08.07)

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